

**Approach Learning & Assessment Centers
2130 E. Fourth Street, Suite 200
Santa Ana, CA 92705**

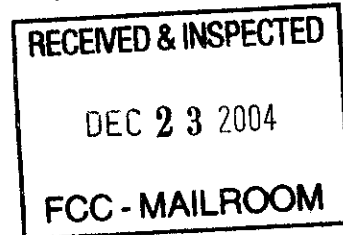
**Phone: (714) 543-5437
Fax: (714) 543-5463**

December 21, 2004

DOCKET FILE COPY ORIGINAL

VIA FEDERAL EXPRESS

Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554



RE: DA 04-3560, Released November 12, 204

This is in response to the Federal Communications Commission's decision on Approach Learning & Assessment Centers' Request for Review of File Nos. SLD-297762, 342756.

This Petition for Reconsideration is based on the fact that the Commission's decision to deny our Request for Review was premised upon an appeal filed outside of the 60-day period, which is incorrect. The facts are not accurately stated within the decision. The SLD Administrator's Decision letter was dated April 22, 2003 (not April 22, 2004), and Robert A. Morrow (not Fran Older) filed an appeal to the FCC on behalf of Approach Learning & Assessment Centers on June 22, 2003 (not August 30, 2004) — within the 60-day filing window.

As the Request for Review to the FCC was filed by Robert A. Morrow, of E-rate Consulting, on behalf of Approach Learning & Assessment Centers, we anticipated that the FCC's response to the appeal would be sent directly to Mr. Morrow in Georgia. The FCC mailed its response to Fran Older at Approach Learning & Assessment Centers; however, Ms. Older has not been affiliated with our organization for almost two years and the letter did not reach the undersigned in time for a response within the 30-day deadline.

We anticipate your favorable response to our Petition to Reconsider our Request for Review of the SLD's decision regarding 471 Application Nos. 297762 and 342756 (please see enclosed documentation).

Respectfully submitted,

Donald A. Verleur II
Chief Executive Officer

No. of Copies rec'd 0
List ABCDE

Bob Morrow



103 Weatherstone Drive
Suite 720
Woodstock, GA 30188
(770) 592-4698 ext. 107
FAX: (770) 592-4693
Toll Free: (888) 249-1661

June 20, 2003

FCC Appeal of SLD Denial of Appeal

CC Docket Nos. 96-45 and 97-21

Contact Information

Robert A. Morrow
Compliance Manager
E-rate Consulting
103 Weatherstone Drive
Suite 720
Woodstock, GA 30188
888-249-1661
FAX: 770-592-4693

bmorrow@erateconsulting.com

Note: Letter of Agency to act on behalf of Approach Learning and Assessment Centers is attached

Name of Entity:

Approach Learning and Assessment Centers (158862)

SLD Action Being Appealed:

Administrator's Decision on Appeal – Funding Year 2002-2003
Dated April 22, 2003 (attached)

471 Application Involved: #297762

(FRNs 764315, 764324, 764333, 764340, 764341, 764346, 764350, 764353, 764355)

Case for Appeal

The issue in this case is straightforward:

Does a simple error constitute a violation of the Schools and Libraries Division's (SLD) ban on vendor involvement in the competitive bidding process, even though no bidding violation was found after several exhaustive reviews by Program Integrity Assurance (PIA) agents. Based on the facts of this case, the answer is an unequivocal "no".

As explained to SLD, and in the appeal to the Universal Services Administrative Company (USAC), the facts are straightforward. Approach Learning and Assessment Centers ("Applicant") engaged the services of Fran Older as an independent E-rate consultant to support the Applicant's E-rate application and documentation. She was paid by Applicant on a monthly basis for the services she rendered. **She was not at any time an employee, agent, officer, director or owner of a service provider and was not paid by a service provider.**

The USAC denied the Applicant's appeal because (1) USAC determined that there was a contradiction between Ms. Older's Statement of Facts and Congresswoman Sanchez's letter, and (2) Ms. Older was listed when the application was reviewed as the service provider's contact person, which would constitute a conflict of interest. Finally in support of their conflict of interest claim, USAC cites the *MasterMind Internet Services, Inc.* decision wherein the FCC upheld SLD's decision to deny funding where a MasterMind employee was listed as the contact person on the FCC Form 470 and MasterMind participated in the competitive bidding process initiated by the FCC Form 470.

When the contact information was discovered incorrect, the applicant attempted to determine how the incorrect contact information was list on the SLD database and not the USAC database as there was no record of a Form 498 submitted to authorize Ms. Older as the contact person.

The Applicant has assumed that the incorrect information on the databases resulted from the Service Provider misinterpretation of the Form 473 guidelines. In 1998, through a bidding process, LW Associates (Service Provider) was selected as the approved service provider. The Service Provider mistakenly listed Ms. Older, the Applicant's contact, in the space intended for the Service Provider's contact. When the error was discovered, the service provider filed the necessary documents (Form 498) to correct the oversight.

On appeal to USAC, the Applicant provided a Statement of Facts and Certification from Ms. Older wherein she certifies that there was an "honest mistake" regarding the misuse of her name on the Form 473 and that it was "immediately corrected." Further, she verifies that she is not and has "never been a consultant to LW Associates" and that she contacts service providers "only when it pertains to e-Rate matters on behalf of applicants." Ms. Older's Statement of Fact is attached as Exhibit "A".

The Applicant also provided a Statement of Facts and Certification from James Carter of LW Associates confirming that listing Fran Older was an "honest mistake" and that she has never been a consultant to LW Associates. Finally, the Applicant submitted a letter from Congresswoman Loretta Sanchez confirming that there was a misunderstanding on completing

the forms. Mr. Carter's Statement of Fact and Representative Sanchez's letter are attached as Exhibits "B" and "C", respectively.

USAC stressed that there was a contradiction between Ms. Older's Statement of Facts and the letter from Congresswoman Sanchez. The likely reason that such emphasis was placed on this alleged contradiction is to try and show that Ms. Older lacked credibility.

According to USAC, the alleged inconsistent statements come from Ms. Older's Statement of Fact wherein she supposed alleges that an internal SLD error was responsible for her name, address and phone number appearing as contact for the service provider. Ms. Older clearly states in her Statement of Fact that "identifying me as the Contact Person was an honest mistake in the interpretation of instructions..." She never attributes the error to SLD. Similarly, Congresswoman Sanchez, in her October 30, 2002 letter to George McDonald of USAC, attributes the error to a misunderstanding of program rules. Based on the actual language, it is incomprehensible as to how USAC concluded that Ms. Older was attributing the error to SLD, as alleged by USAC. What is evident is that there is no contradiction between Ms. Older's Statement of Fact and Congresswoman Sanchez's statement that "LW Associates misunderstood the instructions..." [and named] "Ms. Older [as] the contact person..."

In the appeal denial, the USAC stated, "...at this time this [Form 471] application was reviewed, the SLD's records indicated that Fran Older was the contact person for LW Associates. Therefore, the SLD could only conclude that the contact person for the applicant was connected to the service provider, LW Associates. Program rules require applications to provide a fair and open competitive bidding process." This justification for denial simply repeats the assertion made in the original funding denial, apparently without considering the Statements of Fact from Ms. Older and James Carter of LW Associates submitted in the appeal. As noted above, in these Statements of Fact, Ms. Older and Mr. Carter certified that Ms. Older has no business association with LW Associates and that her listing as a contact for LW Associates was an error made by the vendor when filing for a SPIN number.

Perhaps the most crucial issue is whether or not a conflict of interest existed. In support of their conclusion that a conflict of interest existed, and as noted above, USAC relied upon *MasterMind*. However, there is a clear and obvious factual distinction between *MasterMind* and the instant matter. In *MasterMind*, MasterMind not only participated in the competitive bidding process, but it was also one of the service providers. Therefore, it listed one of its own employees as the contact person. MasterMind argued that there was no rule specifically prohibiting a service provider from being involved in the competitive bidding process. The FCC held that "an applicant violates the Commission's competitive bidding requirements when it surrenders control of the bidding process to a service provider that participates in that bidding process." *In re MasterMind Internet Services, Inc.*, CC Docket 96-45 ¶12 (May 23, 2000).

In this instance, the Applicant *never* surrendered control of the bidding process to the service provider. Rather, the only issue was that the Applicant's consultant was erroneously listed as the service provider's contact person. Therefore, USAC's reliance on *MasterMind* is misguided.

Furthermore, in 2002, SLD, guided by the *MasterMind* decision, posted warnings and clarifications for denials that prohibited service provider contacts from being the same as the contact person shown in Form 470. As noted above, the Applicant's forms were filed in 1998,

four years before the *MasterMind* decision and long before SLD posted its warnings. Despite the foregoing fact, and despite the fact that the error, once discovered, was corrected by filing Form 498 with USAC, and despite the fact that USAC had the correct contacts listed on its computers and despite the fact that the Applicant received funding for funding years 1-4, the SLD, and USAC in its denial of the Applicant's appeal, still found that the honest mistake constituted a "conflict of interest". Yet, by its own definition, and the definition in *MasterMind*, no conflict existed because Ms. Older was not an employee or agent of the service provider.

In conclusion, both the Applicant and the service provider have provided adequate evidence to show that (1) no conflict of interest existed between Ms. Older and the service provider; (2) the *MasterMind* decision is not applicable in this instance to support a claim of a conflict of interest, and (3) the bidding process was approved by SLD during its own Item 25 Selective Review. Therefore, the Applicant asks that the FCC rescind the funding denial.

In the alternative, if the FCC determines that year 5 funding denial is warranted, the Applicant requests that the denial be applied only to the alleged offending service provider's funding requests and not to all funding requests associated with that Form 470. This would be consistent with the recent recommendations of the Task Force on the Prevention of Waste, Fraud and Abuse which states in pertinent part:

Do not automatically deny all of an applicant's funding requests on a Form 471 that cited a particular Form 470 if procurement or contract problems related to the Form 470 posting are identified with a specific funding request or a specific vendor. The Task Force believes that the FCC's current policy has led to the denial of some applicant's funding requests that were not subject to vendor manipulation, simply because the applicant filed a single Form 470 application

Respectfully submitted,

Robert Morrow
Compliance Manager

Enclosures

cc: Ms. Fran Older
Mr. James Carter
Rep. Loretta Sanchez
Daniel Barbra, Senior Legislative Assistant
to Congresswoman Loretta Sanchez
Ruben Smith, Esq.
Thomas Zeigler, Esq.

Administrator's Decision on Appeal - Funding Year 2002-2003

April 22, 2003

Fran Older
Approach Learning and Assessment Centers
2130 East 4th St., Suite 200
Santa Ana, CA 92705

Re: Billed Entity Number: 158862
471 Application Number: 297762
Funding Request Number(s): 764315, 764324, 764333, 764340, 764341,
764346, 764350, 764353, 764355
Your Correspondence Dated: August 28, 2002

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Year 2002 Funding Commitment Decision for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 764315, 764324, 764333, 764340, 764341, 764346,
764350, 764353, 764355

Decision on Appeal: **Denied in full**
Explanation:

- In your letter of appeal you have stated that the application was denied because your name was listed as the contact person for a Service Provider (LW Associates) and the Applicant (Approach Learning and Assessment Centers). You have argued that the SLD has 2 different contact persons listed in its databases for LW Associates. The USAC database shows the correct contact person, while the SLD database incorrectly shows you, Ms Fran Older, as the contact person for LWA. You further state that LWA filed Form 498 with USAC on 7/12/2002, which populated the SLD database with the correct contact persons information on 8/27/2002. You have requested priority handling of this appeal in order to

avoid interruption of services for children preparing to enter college and to avoid untimely and unbudgeted funding by the school for recurring services. You also ask that the "bidding violation" decision be reversed and removed from this schools files so they may proceed with funding approval on Funding Year 5 (2002) and be able to submit their Funding Year 6 application without delay. You assert that the application has cleared exhaustive Selective Reviews, including full disclosure of all bids and proposals. You contend that at no time was a Form 498 SPIN Change Correction processed by the service provider or the applicant to include your name as the contact person for the service provider and that it seems that an internal typographical error is the only explanation for the confusion. You state that due diligence was exhibited by the applicant and the service provider for all timelines required for applications and documentation, while it took the SLD 45 days to make a change that you believe could have been made by PIA through phone, fax or e-mail. You again request priority status as the school has suffered an unnecessary delay in Funding Year 1999 when their application was granted on appeal after an unnecessarily lengthy delay.

- Upon review of the appeal it was determined that your Form 470 included service provider contact information in Block 1, Item 6. This information includes the name of Fran Older, located at 5319 University Dr # 416, Irvine, CA, with the phone # 949-786-1785, and fax # 949-786-4125. At the time the selective review was performed, these were the contact person, address, and phone number for LW Associates as listed in the SLD database for SPIN contacts. On appeal you have acknowledged that this information was changed by the service provider to remove your information on 7/12/2002, 11 days after the date of your Funding Commitment Decision Letter. On appeal you have alleged that an internal SLD error is responsible for your name, address, and phone number appearing as contact for the service provider. This is contradicted in a letter that has been written in your behalf to the SLD from Congresswoman Loretta Sanchez dated 10/30/2002. Congresswoman Sanchez attributes this error to a misunderstanding of program rules as when the form was filed, LW Associates simply thought that the contact on the form should be the person who handled the questions and correspondence for the applicant. This correspondence also states that Ms. Older is an independent E-rate consultant and is not paid or connected with any service provider, including LW Associates. However, at the time this application was reviewed, the SLD's records indicated that Fran Older was the contact person for LW Associates. Therefore, the SLD could only conclude that the contact person for the applicant was connected to the service provider, LW Associates. Program rules require applicants to provide a fair and open competitive bidding process. As per the SLD website; "In order to be sure that a fair and open competition is achieved, any marketing discussions you hold with service providers *must be* neutral, so as not to taint the competitive bidding process. That is, you should not have a relationship with a service provider prior to the competitive bidding that would *unfairly influence* the outcome of a competition or would furnish the service provider with "inside" information or allow them to unfairly compete in any way. A conflict of interest exists, for example, when an applicant's consultant,

who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with a service provider that was selected." As the schools consultant/contact person is also the contact person for a service provider from whom the applicant is requesting services, all FRN's that are associated with this Form 470 must be denied per program rules. Consequently, the appeal is denied.

- FCC rules require applicants to seek competitive bids and in selecting a service provider to carefully consider all bids.¹ FCC rules further require applicants to comply with all applicable state and local competitive bidding requirements.² In the May 23, 2000 *MasterMind Internet Services, Inc. (MasterMind)* appeals decision, the FCC upheld SLD's decision to deny funding where a MasterMind employee was listed as the contact person on the FCC Form 470 and MasterMind participated in the competitive bidding process initiated by the FCC Form 470.³ The FCC reasoned that under those circumstances, the Forms 470 were defective and violated the Commission's competitive bidding requirements, and that in the absence of valid Forms 470, the funding requests were properly denied.⁴ Pursuant to FCC guidance, this principle applies to any service provider contact information on an FCC Form 470 including address, telephone and fax numbers, and email address.
- Conflict of interest principles that apply in competitive bidding situations include preventing the existence of conflicting roles that could bias a contractor's judgment, and preventing unfair competitive advantage.⁵ A competitive bidding violation and conflict of interest exists when an applicant's consultant, who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with a service provider that was selected.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC) via United States Postal Service: FCC, Office of the Secretary, 445-12th Street SW, Washington, DC 20554. If you are submitting your appeal to the FCC by other than United States Postal Service, check the SLD web site for more information. Please reference CC Docket Nos. 96-45 and 97-21 on the first page of your appeal. **The FCC must RECEIVE your appeal WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER for your appeal to be filed in a timely fashion.** Further information and new options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site, www.sl.universalservice.org.

¹ See 47 C.F.R. §§ 54.504(a), 54.511(a).

² See 47 C.F.R. § 54.504(a), (b)(2)(vi).

³ See *In re MasterMind Internet Services, Inc.*, CC Docket 96-45, ¶ 9 (May 23, 2000).

⁴ See *id.*

⁵ See, e.g., 48 C.F.R. § 9.505(a), (b).

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

April 22, 2003

Fran Older
Approach Learning and Assessment Centers
2130 East 4th St., Suite 200
Santa Ana, CA 92705

Re: Billed Entity Number: 158862
 471 Application Number: 324756
 Funding Request Number(s): 869713
 Your Correspondence Dated: August 28, 2002

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Year 2002 Funding Commitment Decision for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 869713
Decision on Appeal: **Denied in full**
Explanation:

- In your letter of appeal you have stated that the application was denied because your name was listed as the contact person for a Service Provider (LW Associates) and the Applicant (Approach Learning and Assessment Centers). You have argued that the SLD has 2 different contact persons listed in its databases for LW Associates. The USAC database shows the correct contact person, while the SLD database incorrectly shows you, Ms Fran Older, as the contact person for LWA. You further state that LWA filed Form 498 with USAC on 7/12/2002, which populated the SLD database with the correct contact persons information on 8/27/2002. You have requested priority handling of this appeal in order to avoid interruption of services for children preparing to enter college and to avoid untimely and unbudgeted funding by the school for recurring services. You also ask that the "bidding violation" decision be reversed and removed from this schools files so they may proceed with funding approval on Funding Year 5 (2002) and be able to submit their Funding Year 6 application without delay. You

assert that the application has cleared exhaustive Selective Reviews, including full disclosure of all bids and proposals. You contend that at no time was a Form 498 SPIN Change Correction processed by the service provider or the applicant to include your name as the contact person for the service provider and that it seems that an internal typographical error is the only explanation for the confusion. You state that due diligence was exhibited by the applicant and the service provider for all timelines required for applications and documentation, while it took the SLD 45 days to make a change that you believe could have been made by PIA through phone, fax or e-mail. You again request priority status as the school has suffered an unnecessary delay in Funding Year 1999 when their application was granted on appeal after an unnecessarily lengthy delay.

- Upon review of the appeal it was determined that your Form 470 included service provider contact information in Block 1, Item 6. This information includes the name of Fran Older, located at 5319 University Dr # 416, Irvine, CA, with the phone # 949-786-1785, and fax # 949-786-4125. At the time the selective review was performed, these were the contact person, address, and phone number for LW Associates as listed in the SLD database for SPIN contacts. On appeal you have acknowledged that this information was changed by the service provider to remove your information on 7/12/2002, 11 days after the date of your Funding Commitment Decision Letter. On appeal you have alleged that an internal SLD error is responsible for your name, address, and phone number appearing as contact for the service provider. This is contradicted in a letter that has been written in your behalf to the SLD from Congresswoman Loretta Sanchez dated 10/30/2002. Congresswoman Sanchez attributes this error to a misunderstanding of program rules as when the form was filed, LW Associates simply thought that the contact on the form should be the person who handled the questions and correspondence for the applicant. This correspondence also states that Ms. Older is an independent E-rate consultant and is not paid or connected with any service provider, including LW Associates. However, at the time this application was reviewed, the SLD's records indicated that Fran Older was the contact person for LW Associates. Therefore, the SLD could only conclude that the contact person for the applicant was connected to the service provider, LW Associates. Program rules require applicants to provide a fair and open competitive bidding process. As per the SLD website; "In order to be sure that a fair and open competition is achieved, any marketing discussions you hold with service providers must be neutral, so as not to taint the competitive bidding process. That is, you should not have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow them to unfairly compete in any way. A conflict of interest exists, for example, when an applicant's consultant, who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with a service provider that was selected." As the schools consultant/contact person is also the contact person for a service provider from whom the applicant is

requesting services, all FRN's that are associated with this Form 470 must be denied per program rules. Consequently, the appeal is denied.

- FCC rules require applicants to seek competitive bids and in selecting a service provider to carefully consider all bids.¹ FCC rules further require applicants to comply with all applicable state and local competitive bidding requirements.² In the May 23, 2000 *MasterMind Internet Services, Inc. (MasterMind)* appeals decision, the FCC upheld SLD's decision to deny funding where a MasterMind employee was listed as the contact person on the FCC Form 470 and MasterMind participated in the competitive bidding process initiated by the FCC Form 470.³ The FCC reasoned that under those circumstances, the Forms 470 were defective and violated the Commission's competitive bidding requirements, and that in the absence of valid Forms 470, the funding requests were properly denied.⁴ Pursuant to FCC guidance, this principle applies to any service provider contact information on an FCC Form 470 including address, telephone and fax numbers, and email address.
- Conflict of interest principles that apply in competitive bidding situations include preventing the existence of conflicting roles that could bias a contractor's judgment, and preventing unfair competitive advantage.⁵ A competitive bidding violation and conflict of interest exists when an applicant's consultant, who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with a service provider that was selected.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC) via United States Postal Service: FCC, Office of the Secretary, 445-12th Street SW, Washington, DC 20554. If you are submitting your appeal to the FCC by other than United States Postal Service, check the SLD web site for more information. Please reference CC Docket Nos. 96-45 and 97-21 on the first page of your appeal. **The FCC must RECEIVE your appeal WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER for your appeal to be filed in a timely fashion.** Further information and new options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site, www.sl.universalservice.org.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

¹ See 47 C.F.R. §§ 54.504(a), 54.511(a).

² See 47 C.F.R. § 54.504(a), (b)(2)(vi).

³ See *In re MasterMind Internet Services, Inc.*, CC Docket 96-45, ¶ 9 (May 23, 2000).

⁴ See *id.*

⁵ See, e.g., 48 C.F.R. § 9.505(a), (b).